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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 655.

JOSEPH THOMAS MULLOY,
Petitioner,

vs.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE.

As *Amici Curiae* Wayne Spencer Deri, Lucian Gatewood, Dennis J. Iannarelli, Richard Charles Kendall, Charles D. Knight, William Lawrence Morton, John Francis Paul, William N. Robinson, Mordecai Rotem, Charles Stikes, Richard L. Swogger, John G. Toth, Jr., Raymond Leo Vincent, Jr., and Paul V. von Schoeler respectfully move that they be granted leave to file their brief in support of the petitioner herein. Their interest is stated in the brief, which is attached hereto. Written consent for the filing of this brief on or before March 16, 1970, has been granted by both parties and has been filed with the Clerk.

Respectfully submitted,

RALPH RUDD,
BENJAMIN B. SHEERER,
Attorneys for Amici Curiae.

In the Supreme Court of the United States

OCTOBER TERM, 1969.

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JOSEPH THOMAS MULLOY,
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vs.

UNITED STATES,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR AMICI CURIAE,

Wayne Spencer Deri, Lucian Gatewood, Dennis J. Iannarelli, Richard Charles Kendall, Charles D. Knight, William Lawrence Morton, John Francis Paul, William N. Robinson, Mordecai Rotem, Charles Stikes, Richard L. Swogger, John G. Toth, Jr., Raymond Leo Vincent, Jr., and Paul V. von Schoeler.

INTEREST OF THE AMICI CURIAE.

The *amici curiae* are Selective Service registrants.[1] Each of them has presented to his local board facts which if true would justify a change in his classification, it is believed, but in each case the local board has failed or refused to reopen the classification and classify the registrant anew.

[1] For purposes of identification, their Selective Service numbers are as follows:

Wayne Spencer Deri, 33-46-45-213;
Lucian Gatewood, 15-45-45-54;

(Continued on following page)

One of the essential issues presented by this case and by the opinion of the Court of Appeals arises from the fact that the petitioner claims he presented facts to his local board which, if true, would have justified a change in his classification, but that his local board refused to reopen his classification and classify him anew. The Court of Appeals held that the failure to reopen was proper.

Amici support the position of the petitioner Mulloy that upon the presentation of new facts which would justify a new classification, the local board must reopen and classify anew.

Thus, in the case of each of the *amici curiae* his future classification, his right to a writ of habeas corpus after induction; or his right to be acquitted after refusing induction may depend on this Court's ruling in this case.

(Continued from preceding page)

Dennis J. Iannarelli, 33-32-46-271;
Richard Charles Kendall, 33-4-45-361;
Charles D. Knight, 33-32-46-1279;
William Lawrence Morton, 33-31-49-1037;
John Francis Paul, 33-11-47-464;
William N. Robinson, 33-31-44-915;
Mordecai Rotem, 33-71-44-645;
Charles Stikes, 15-47-45-82;
Richard L. Swogger, 33-46-45-379;
John G. Toth, Jr., 33-470-50-1156;
Raymond Leo Vincent, Jr., 33-112-44-110;
Paul V. von Schoeler, 2-17-44-94.

QUESTIONS PRESENTED.[2]

1. If new facts, not frivolous, are presented to a Selective Service local board pursuant to 32 CFR § 1625.2, and if those facts would justify a change in the classification of the registrant if they are true, does the board have discretion to refuse to reopen the classification and classify the registrant anew?

Amici answer NO.

2. More particularly, may the board refuse to reopen and reclassify on the ground that the facts claimed are untrue, whether with or without investigation by the board?

Amici answer NO.

3. In determining whether a Selective Service local board has committed procedural error, is a court's scope of review limited to the basis-in-fact test enunciated in *Estep v. U. S.*, 327 U.S. 114, 1946?

Amici answer NO.

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[2] These questions relate to the subject matter encompassed by the petitioner's questions 1 and 3. The petitioner's questions 2 and 4 are vital questions to many registrants, including some of the *amici* herein, but since they are not of common concern to all the *amici*, they are not dealt with in this Brief.

SUMMARY OF ARGUMENT.

The Selective Service regulations provide for review of classification decisions by personal appearance and appeal. They provide for a reopening of a registrant's classification to consider new facts whenever such facts are claimed and whenever such facts would, if true, justify a change in classification. Due process requires that these facts be given full consideration and, if necessary, that the registrant be provided an opportunity to demonstrate the truth of the facts claimed in a personal appearance before the local board and again, if necessary, to have review of the board's decision on appeal. The Courts of Appeal of all the circuits that have ruled on this question (not excluding the Sixth Circuit) have held that reopening under such circumstances is mandatory.

The Court below in this case attached a further condition to the right of reopening that effectively destroys it. It held that the facts stated must be true and that the local board has power to determine their truth and refuse to reopen if it finds that they are untrue. The determination of truth is not an easy matter and is the central object of the procedures of due process of law. For the board to undertake to make a determination unilaterally, *ex parte*, without opportunity for the registrant to discuss with the board whatever error he believes it may have made would subject the registrant completely to the whim, caprice or mistake of the local board in a manner completely violative of due process of law.

In a case involving a claim of conscientious objection, the refusal to reopen should be subject to even closer scrutiny because such a claim adds First Amendment considerations to those of the Fifth Amendment, and an erroneous classification would subject the registrant to

burdens upon his freedom of conscience and freedom of exercise of his religious belief that are peculiarly abhorrent in our constitutional system.

The scope of review in Selective Service matters is limited to an inquiry as to whether there is a basis in fact for the classification that has been issued to a registrant only with respect to a local board determination made in accordance with the regulations. Before a court reaches the application of that test it must be determined whether the local board's decision was made in accordance with the regulations, and this determination should be made *de novo* on the basis of a preponderance of the evidence. The determination as to whether a local board properly or improperly refused to reopen a registrant's classification does not involve the merits of the classification but only the procedural question as to whether a *prima facie* case was stated. This is a question of law, not of fact, and is not subject to the basis-in-fact test. It should be approached as a problem to be determined *de novo* and in accordance with a preponderance of the evidence. Thus the Court of Appeals applied the wrong test as to scope of review, and for this reason as well as the others, the petitioner's appeal should be granted.

ARGUMENT.

A. Procedural background.

Normally a registrant is classified initially on the basis of information supplied by him on a Classification Questionnaire, (SSS Form 100),[3] mailed to him by the local board.[4]

The local board is required to receive and consider all pertinent information presented to it. It considers each registrant to be available for military service until his eligibility for deferment or exemption is clearly established to its satisfaction. Thus, the local board has the responsibility to decide, subject to appeal, the class in which each registrant shall be placed at any time based on the information before it.[5]

Promptly after classification the registrant is mailed a notice thereof on a Notice of Classification (SSS Form 110).[6]

As the registrant is advised on the back of the Notice of Classification (SSS Form 110), his classification is followed by a right to have a personal appearance before the local board if he makes request for it within thirty days.[7] After the personal appearance, whether or not the local board determines that the new information presented at the personal appearance justifies a change in the registrant's classification, it is required to mail a new notice of classification (SSS Form 110) to the registrant.[8]

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[3] SSLR 2156: 3-6.

[4] 32 CFR §§ 1621.9-.10.

[5] 32 CFR § 1622.1 (c).

[6] 32 CFR § 1623.4 (a). A copy of the form is set forth at SSLR 2156: 8.

[7] 32 CFR §§ 1624.1-.3.

[8] 32 CFR §§ 1624.2 (c) and (d).

From each classification by the local board including those following a personal appearance the registrant has the right of appeal to an appeal board by giving written notice to the local board within thirty days (sixty days in some instances).[9] Thus the registrant may appeal after the local board's initial classification, or he may first request a personal appearance before the local board and then appeal. In either case the appeal is to the appeal board for the area in which the local board is located,[10] unless the registrant lives or works in another area and has asked for the appeal to go to the appeal board having jurisdiction there,[11] or the registrant is seeking an occupational deferment, works in a different area, and requests appeal to the appeal board having jurisdiction over his place of work.[12] In most cases, the area served by each appeal board is an entire federal judicial district.[13] There is no personal appearance before the appeal board; the board acts solely on the basis of information contained in the record received from the local board, plus general information concerning economic, industrial and social conditions.[14]

If one or more members of the appeal board dissent from the classification it gives, the registrant may appeal to the President.[15] If the appeal board is unanimous in its decision, either the State Director or the [National] Director of Selective Service may take an appeal to the

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[9] 32 CFR §§1624.2(e), 1626.2.

[10] 32 CFR §1626.13(b).

[11] 32 CFR §1626.11(c).

[12] 32 CFR §1626.11(b).

[13] 32 CFR §1604.21.

[14] 32 CFR §1626.24(b).

[15] 32 CFR §1627.3.

President.[16] An "Appeal to the President" is determined by the National Selective Service Appeal Board.[17]

B. Reopening of classification.

At any time after a registrant has been classified his circumstances may change. Local boards routinely forward to registrants from time to time a Current Information Questionnaire (SSS Form 127) [18] in order to update their information about the registrant. In addition, there are other forms appropriate for specific circumstances, such as the Dependency Questionnaire (SSS Form 118)[19] and the Special Form for Conscientious Objector (SSS Form 150).[20] Moreover, the local board may secure information from welfare and governmental agencies and has the power to subpoena witnesses.[21] (The latter power is thought to be rarely used).

The provisions chiefly involved in this appeal and in this Brief of *amici curiae* are those relating to the reopening of a registrant's classification when the registrant himself presents new information and asks that his classification be reopened. This situation is provided for by the regulations in 32 CFR Part 1625. These sections of the regulations are set forth at pages 4a-7a of the petitioner's brief on the merits.

Briefly summarized and as pertinent here these sections provide that the local board may reopen and consider anew the classification of a registrant upon his written request if he presents facts not considered when he was

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[16] 32 CFR § 1627.1 (a).

[17] 32 CFR §§ 1604.6 (a), (b).

[18] SSLR 2156:11.

[19] SSLR 2156:9-10.

[20] SSLR 2156:14.1-14.2.

[21] 32 CFR §§ 1621.14, 1621.15.

classified and which, if true, would justify a change in his classification.

Perhaps the most important words in this section (32 CFR § 1625.2) are the words "if true." These words have generally been interpreted by the courts as identifying a *prima facie* case, and each court of appeals that has ruled on this question (not excepting the Sixth) has held that when such a case is presented it is constitutionally mandatory for the local board to reopen the registrant's classification and classify him anew.[22]

This holding of the Courts of Appeal is based upon the consequences that flow from the local board's decision either to reopen the classification or not to reopen it. If the local board reopens the classification, it shall again classify the registrant "in the same manner as if he had never before been classified." "Such classification shall be and have the effect of a new and original classification, even though the registrant is again placed in the class that he was in before his classification was reopened." [23]

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[22] Second Circuit: *U.S. v. Vincelli*, 215 F.2d 210, reh. den. 216 F.2d 681, 1954.

Third Circuit: *U.S. ex rel. Berman v. Craig*, 207 F.2d 888, 1953.

Fourth Circuit: *U.S. v. Grier*, 415 F.2d 1098, 1969.

Fifth Circuit: *Olvera v. U.S.*, 223 F.2d 880, 1955; *Robertson v. U.S.*, 404 F.2d 1141, 1960, rev'd on other grounds, 2 SSLR 3291.

Sixth Circuit: *Townsend v. Zimmerman*, 237 F.2d 376, 1956.

Seventh Circuit: *U.S. v. Ransom*, 223 F.2d 15, 1955; *U.S. v. Freeman*, 388 F.2d 246, 1967.

Eighth Circuit: *Vaughn v. U.S.*, 404 F.2d 586, 1968; *Davis v. U.S.*, 410 F.2d 89, 1969; *U.S. v. Rundle*, 413 F.2d 329, 1969.

Ninth Circuit: *Stain v. U.S.*, 235 F.2d 339, 1956; *Miller v. U.S.*, 388 F.2d 973, 1967; *Petrie v. U.S.*, 407 F.2d 267, 1969; *Howze v. U.S.*, 409 F.2d 27, 1969; *Mizrahi v. U.S.*, 409 F.2d 1219, 1969.

Tenth Circuit: *Warren v. Abernathy*, 198 F.2d 622, 1952.

[23] 32 CFR § 1625.11. This terminology is different from that of 32 CFR § 1624.2(c), which indicates that a classification is "reopened" only when it is changed.

The registrant is to be notified of the new classification[24] and then has the same right of appearance before the local board and the same right of appeal as in the case of an original classification.[25]

Thus, the Courts of Appeal have noted that the failure or refusal of the local board to reopen the classification prevents the registrant from having an opportunity for personal appearance and appeal. They have therefore held that where the necessary *prima facie* case has been presented, this prevention of opportunity for personal appearance and appeal is a denial of due process of law.[26]

C. The opinion below.

The Sixth Circuit opinion in the *Mulloy* case directly contradicts the doctrine that reopening is mandatory when a *prima facie* case is stated. After quoting on pages 7 and 8 (Appendix) from 32 CFR §§ 1625.2 and 1625.4 the Court says:

> "Under regulation 1625.2, the board has discretion to determine whether or not it will reopen a classification, but Regulation 1625.4 appears to be mandatory in that the board shall not reopen the classification when it is of the opinion that the facts if true do not justify a change in classification."

This conclusion of the Court results from too shallow a reading of the regulations, looking only to the common meanings of the verbs "may" and "shall." The result of this reading would be that while the local board has no discretion to grant a reopening when a *prima facie* case is not stated, yet if a *prima facie* case is stated, that is, if facts are stated which, if true, *would* justify a change in

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[24] 32 CFR § 1625.12.

[25] 32 CFR § 1625.13.

[26] See cases cited in Footnote 22, above.

the classification, the local board may either grant or refuse a reopening of the classification in its "discretion."[27] If that were so, what would guide the board's exercise of this "discretion"? No standard appears. May it grant the reopening because it likes religious quietists and deny it because it dislikes religious activists like Mulloy? Such arbitrary and uncontrolled discretion, if the local board had it, would seem to be an improper delegation of legislative power, completely repugnant to due process of law. The regulations should not be read to intend such a result if that reading can be avoided.

That reading is easily avoided. The regulations grant the local board a power to reopen when certain conditions are fulfilled, but only when those conditions are fulfilled. The "shall not" clause (1625.4) is simply the complement of the "may" clause (1625.2). Together they occupy the field. The power is not granted idly. When the conditions are fulfilled, the power is intended to be exercised. If it had been intended that when *these* conditions are met the board must look to still further conditions to determine whether to reopen, the further conditions would have been stated. The omission to state further conditions implies that no further conditions must be met and that the board must therefore reopen when *these* conditions are fulfilled.

But the courts that have adopted the rule that reopening is mandatory when the required facts are presented have looked straight to the constitutional requirement of due process and have determined that in effect "may" means "shall" (in 1625.2), for otherwise the registrant is deprived of opportunity to establish the truth and validity of his claim by personal appearance and appeal.

This constitutional principle the Sixth Circuit opinion

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[27] This interpretation was expressly rejected in *Olvera v. U.S.*, 223 F.2d 15, 7th Cir., 1955.

ignores. It quotes *Smith v. United States*, 157 F.2d 176 (4th Cir., 1946) and *United States v. Bartelt*, 200 F.2d 385, 389 (7th Cir., 1952) as sustaining the local board's discretion. But *Smith* was decided before the constitutional principle seems to have been recognized, and the only one of the cases that recognized this doctrine that preceded *Bartelt* was *Warren v. Abernathy*, 198 F.2d 622 (10th Cir., 1952). *Warren v. Abernathy* did not contain a full statement of the doctrine. It held that a refusal to reopen was proper because certain facts necessary to justify a change in classification were not shown, and stated the affirmative doctrine of mandatory reopening only obliquely:

> "We should not be understood as holding, however, that an arbitrary and capricious refusal to reopen and consider anew registrant's classification on a proper showing would not be open to judicial review."

The Sixth Circuit then proceeds to mis-state the holdings of the two *Gearey* cases, *United States v. Gearey*, 368 F.2d 144 (2nd Cir., 1966), and 379 F.2d 915 (2nd Cir., 1967). The Court says:

> "In *Gearey*, the board considered on the merits the request to reopen a classification after an order to report for induction, and the Court held that there was a rational basis for the board's determination that the registrant was not a genuine conscientious objector and the board therefore was not required to reopen his classification."

We do not so read the *Gearey* cases. In *Gearey I*, the Court held that because the registrant's claim of conscientious objection had not been asserted until after the induction notice had been issued, the local board must determine whether the applicant's beliefs matured before the induction notice or not until afterwards, and that only if

they matured after the induction notice and thus constituted a change of status resulting from circumstances over which the registrant had no control would the registrant be entitled to be reclassified by the local board. The local board had told Gearey that it did not believe he was a genuine conscientious objector and the Court of Appeals remanded the case to the District Court to determine whether the local board had meant that he never was or was not before the induction notice was sent. If it was the latter, implying that the registrant had become a conscientious objector after the induction notice, the indictment must be dismissed, the Court of Appeals said.

Gearey II simply sustained the refusal to reopen the classification on the basis of a District Court finding that the local board had refused to do so on the ground that there had been no change of status due to circumstances over which the registrant had no control. It sustained the board's refusal to grant the I-O classification on the ground that although it would have been willing to waive the lateness of claim if convinced of Gearey's sincerity, it was not so convinced and had basis in fact not to be.

Section 1625.2 imposes a significantly heavier burden for reopening a classification after an induction notice has been sent to the registrant. Then he must show the new facts he relies on came about through circumstances beyond his control. This provision is not involved in this case.

The next paragraph of the Court of Appeals opinion in *Mulloy* says that appellant's contention if upheld would result in interminable delays. It quotes *U.S. v. Taylor*, 351 F.2d 228 (6th Cir., 1965). But the *Taylor* case did not deny that reopening is mandatory when a *prima facie* case is presented before an induction notice. It noted that there had been no finding that Taylor's conscientious objection

had matured after the induction notice and concluded that it seemed reasonable for the regulations to provide that a claim of conscientious objection must be made before the order to report for induction. The Court was referring to a claim of conscientious objection that apparently existed long before the induction notice but was not asserted until afterward. In that case, reopening is expressly barred by the proviso that follows 32 CFR § 1625.2(b), a provision not involved in *Mulloy*, as we noted above.

As for interminable delays there is nothing more than an imaginary danger of a registrant avoiding induction through false statements with respect to his eligibility for classification as a conscientious objector. Severe criminal sanctions await those presenting perjured testimony. Moreover, under the Executive Order of November 26, 1969, establishing the new lottery or random selection system, the amendment of 32 CFR § 1631.7(a), in its first proviso bars avoidance of induction by delay except for the rare registrant whose liability has not been extended by a deferment under § 6 of the Act.[28]

D. The most serious error.

In our view the Court of Appeals committed its most serious error in the following paragraph (Appendix, Page 9):

> "Under Mulloy's contention, all a registrant needs to do is to state facts in support of his application and the Board is limited to his statement. In our judgment, the facts stated must be true and the Board has the power to investigate and determine the truth. Suppose a registrant who is classified I-A requests the Board to reopen his classification and place him in 3-A, alleging that he is living with and supporting his

[28] 50 USCA App. § 456, as provided in the second proviso of § 6(h)(2), 50 USCA App. § 456(h)(2).

> wife and family. If appellant's allegations were true, the Board would be obligated to reopen his classification and reclassify him. *Townsend v. Zimmerman*, 237 F.2d 376 (6th Cir. 1956). However, the Board, under the investigative powers granted to it in 32 C.F.R. § 1625.1(c), may learn that the allegation was false. Is the Board nevertheless required to reopen his classification and reclassify him? We say, 'No.'"

The Sixth Circuit seems to seek defense against a danger greater than exists. It seems ignorant of the fact that other courts had already held that the classification need not be reopened if the facts stated are "frivolous, wholly unsubstantial, and unworthy of any consideration."[29] Nor did it seem aware that other courts have indicated that reopening is not required unless the facts stated would, if true, justify a reclassification to any reasonable mind.[30] Nor did the Sixth Circuit in *Mulloy* seem aware that another case had previously held that the problem is whether the facts stated provided a basis in fact to *grant* the change in classification requested.[31]

Not recognizing these limitations on the right to reopening, the Sixth Circuit seized upon a limitation that goes much too far:

> "In our judgment, the facts stated must be true and the board has the power to investigate and determine the truth."

This goes too far because it directs the local board to make an *ex parte* determination of fact without opportunity for the registrant to offer rebuttal or correction in the event the board is misinformed or draws an erroneous

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[29] *Albert Stain v. U.S.*, 335 F.2d 339, 9th Cir., 1956. *U.S. v. Vincelli*, 215 F.2d 210, reh. den. 216 F.2d 681, 2nd Cir., 1954.

[30] *Petrie v. U.S.*, 407 F.2d 267, 9th Cir., 1969, quoting *U.S. v. Longworth*, 269 F. Supp. 971, 974, SD Ohio, 1967.

[31] *Howze v. U.S.*, 409 F.2d 27, 9th Cir., 1969.

inference. It establishes the local board, not only as judge, jury and executioner, but as investigator and prosecutor as well, without opportunity for the registrant to hear the evidence and present rebuttal.

The personal appearance is the registrant's sole opportunity to meet with his board on the subject of his classification. The regulations say he may present his case orally and in writing at that time. He may present "*further* information." He is allowed to make a summary of what transpires at the appearance and place it in his file to be considered upon appeal.

The Selective Service System was designed to produce men for the military service promptly. Only a modicum of procedural rights is granted the registrant. If the holding below is upheld, even these bare rights are substantially diminished and the System is on its way to becoming a faceless bureaucracy which controls the lives of many young men.

The prime function of a judicial trial is to determine facts. Elaborate safeguards have been established to assist in the effort to discover the truth: the right of parties to be present, to hear the evidence, to cross-examine witnesses, to present evidence on their own behalf, to exclude hearsay and other incompetent or irrelevant evidence, and to argue before the trier of fact.

Little enough of this protection is available when facts are determined by a Selective Service local board. In his personal appearance the registrant may not have counsel.[32] He may present witnesses or even have an observer present only at the sufferance of the local board.[33]

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[32] 32 CFR § 1624.1 (b).

[33] 32 CFR § 1624.1 (b).

No regulation or statutory provision expressly requires the local board to advise the registrant as to the reasoning or assumed factual basis for its decision, although courts are beginning to do so.[34]

If the local board is permitted to make investigations and determine facts as a means of determining whether or not the classification is to be reopened, the registrant will be denied opportunity to exercise even such rights as the personal appearance affords him to contribute toward the determination of the truth. Moreover, this denial will occur in the very circumstance when the registrant is most in need of being able to make his contribution toward that determination, that is, when the board thinks it has found that the registrant's claims are false. And the registrant will be deprived also of opportunity for review of the board's adverse decision by appeal.

If there is any saving grace in the Selective Service procedures, saving them from unredeemable violation of the rights of due process, it is that no substantial factual determination adverse to a registrant, no adverse judgment as to the truth of competent facts he claims, no unfavorable determination as to his credibility or the validity of his claims can be made without granting him an opportunity to discuss the matter with the local board, to find out, if it will tell him, why it has so ruled, to offer on his own behalf whatever evidence and argument he can muster in his own person, and then, if he fails before the local board, to try again (but only through his file) with the appeal board. This is the meaning the Courts of Appeal (except, now, the Sixth Circuit) have given, in essence, to the com-

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[34] *U.S. v. St. Clair*, 293 F. Supp. 337, EDNY, 1968. *U.S. v. Washington*, 392 F.2d 37, 39, 6th Cir., 1968. *U.S. v. Lonseth*, 300 F. Supp. 857, D. Ore., 1969. *U.S. v. Haughton*, 413 F.2d 736, 9th Cir., 1969. *U.S. v. James*, 2 SSLR 3231, 4th Cir., 1969.

plex interplay of the provisions for personal appearance, appeal, and reopening of classification.[35]

The doctrine the Sixth Circuit has promulgated in Mulloy would strip the registrant of this protection and leave him at the mercy of the board's star-chamber decision, unilateral, *ex parte*, unlimited by presentation of the truth if the board is in error, devoid of due process.

The error is made no more palatable by the opinion's citation of *Townsend v. Zimmerman*, 237 F.2d 376, 6th Cir., 1956. That case did not depend on the truth of the registrant's allegations, but only on the fact that they were made. Because the allegations were made and if true would have justified a change in the classification, the local board was required to reopen the classification and its failure to do so was remedied by injunction.[36]

In short, the Court below overlooked the presence and significance of the words "if true." [37]

E. First Amendment considerations.

What we have said up to now relates to the due process requirements of the Fifth Amendment, and applies with equal force whether the registrant's claim is

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[35] 32 CFR Parts 1624, 1626, and 1625, respectively. For especially pointed support for this statement of the right of review by personal appearance and appeal see the cases on *de facto* reopening:

U.S. v. Vincelli, 216 F.2d 681, denying reh. of 215 F.2d 210, 2d Cir., 1954.

U.S. v. Freeman, 388 F.2d 246, 7th Cir., 1967.

Miller v. U.S., 388 F.2d 973, 9th Cir., 1967.

Robertson v. U.S., 404 F.2d 1141, 5th Cir., 1969, rev'd on other grounds, 417 F.2d 440, 1969.

U.S. v. Grier, 415 F.2d 1098, 4th Cir., 1969.

[36] This was before the 1967 enactment of the 15th sentence of Section 10(b)(3) (15 USCA App. § 460(b)(3)).

[37] 32 CFR § 1625.2.

conscientious objection, dependency, student status, or occupational deferment. Several of the *amici curiae*, however, have made claims of conscientious objection and it is in relation to these claims that their respective local boards have refused to reopen their classifications. Thus these *amici* have a special interest in petitioner's problems of reopening as they relate to this claim of conscientious objection.

It may be that exemption from military service of conscientious objectors is not required by the First Amendment. Be that as it may, it is clear that the exemption contained in § 6(j) of the Military Selective Service Act of 1967[38] serves religious interests protected by the First Amendment—freedom of exercise and freedom of conscience. See *U.S. v. Seeger*, 380 U.S. 163, 170, 183-185. The statute insures (in the absence of administrative error) that a man will not be required to choose between going to war in violation of his religious convictions or going to jail in the free exercise of those beliefs. Indeed, the statute offers two alternative forms of service which enable a young man to avoid the constitutional dilemma of being required to either kill in violation of his religious beliefs or face incarceration as a penalty for their free exercise.

Such statutory protection of constitutional rights is illusory in the absence of adequate procedural safeguards.[39]

Thus there is a special constitutional concern under the First Amendment to assure adequate opportunities for

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[38] 50 USCA App. § 456(j), set forth on page 1a of Appendix A in the Brief for the petitioner.

[39] See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-162, 1951 (Frankfurter concurring), *United States v. Freeman*, 388 F.2d 246, 248-49, 7th Cir., 1967.

a registrant to establish that he is a conscientious objector. Determination of this fact requires peculiarly subtle and perceptive discriminations as to both the registrant's sincerity and as to the basis of his belief in an area that is essentially private and often intricate.[40]

An erroneous refusal to reopen a classification under these circumstances places the registrant on the horns of a dilemma of constitutional proportions. If he is to freely exercise his religious beliefs, he must undergo prosecution for the commission of a felony.[41] If he steps forward at induction and betrays his religious beliefs, our laws have induced an unconscionable erosion of the free exercise clause. These considerations lend additional weight to the importance of requiring a local board to accord full opportunity for consideration of a claim of conscientious objection unless no basis can be found for granting the reopening.

Thus while due process requires opportunity for personal appearance and appeal when the board is presented with facts which, if true, would justify a change in classification, the requirement of reopening in such circumstances gains additional weight from the First Amendment when the new facts constitute a *prima facie* claim of conscientious objection.

F. Scope of review.

In the Court of Appeals opinion at page 11 of the Appendix the Court refers to the limitation of the scope of judicial review to a determination of whether there is basis in fact for the classification. The fundamental statement of this limitation was contained in *Estep v. United States,*

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[40] See *U.S. v. Seeger,* 380 U.S. 163, 1965; *Witmer v. U.S.,* 348 U.S. 375, 1955.

[41] *U.S. v. Freeman,* 388 F.2d 246, 249, 7th Cir., 1967.

327 U.S. 114, 1946. As we read *Estep*, there is a sharp distinction between the scope of review to be applied when a local board has made a decision in conformity with the regulations and that which is to be applied in determining whether or not the local board has acted in accordance with the regulations. At considerable length[42] the Court demonstrated that action of a local board relating to a person outside its territorial jurisdiction, or racially discriminatory in violation of the regulations, or in violation of the deferment of governors and members of Congress, or refusing to reopen a classification and cancel an induction notice on request of the State Director or the Director, or classifying a registrant as available for military service because he was a Jew, German or Negro would be lawless and beyond its jurisdiction; and that violation of such orders would not be subject to the criminal sanctions of the Act. With respect to such lawless action beyond the jurisdiction of the local board, there seems to be no limitation with respect to the scope of review. It appears that a reviewing court's determination that the local board has so acted in violation of the law or regulations is a question to be determined *de novo* by the reviewing court in accordance with a preponderance of the evidence. And then, the Court said:

> "The provision making the decisions of the local board 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous.

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[42] 327 U.S. at 120-122.

The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Clearly the basis-in-fact test is applicable only after it has been determined that the decision of the local board has been made in conformity with the regulations. It applies only to review of a decision that under another rule might involve a weighing of the evidence to determine whether the classification made by the local board was justified, that is to the question of whether the evidence sustains the conclusion reached by the local board. On that question and that question only would the basis-in-fact test seem to be applicable.

Thus it seems that a court's determination as to whether a local board has acted properly in refusing to reopen a classification does not properly call for application of the basis-in-fact test. The determination as to whether the new facts require reopening does not require consideration of evidence for the purpose of determining truth, for the truth of the facts is to be assumed for the purpose of this determination. Thus there was no occasion for the Court of Appeals to invoke the basis-in-fact test in its ruling as to whether the local board had properly or improperly refused to reopen Mulloy's classification.

We are aware that *Petrie v. United States*[43] discusses the requirement of reopening in terms of basis in fact. However, it applies a special meaning for the term "basis in fact," limiting the inquiry to a determination, as to whether or not the elements of a *prima facie* case have been presented. Most of the Courts of Appeal have not discussed reopening in terms of basis in fact and it seems

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[43] 407 F.2d 267, 9th Cir., 1969.

to us highly confusing to do so. The basis-in-fact test has so often been applied to call for a searching of the record to see if any ground can be found on which the board's decision can be sustained that the use of that term in this situation where there is properly no inquiry beyond the content of the pleadings, as it were, seems very likely to mislead the court, as perhaps happened in the *Mulloy* case in the Sixth Circuit.

We urge that the Court take this opportunity to make it clear that the limited scope of review imposed by the basis-in-fact test applies only to review of a factual determination by the local board made either on the initial classification or on reopening but in either case with full opportunity for review of the board's decision by personal appearance and appeal. We suggest that only when a board's factual determination has been subject to such review by personal appearance and appeal can it possibly be regarded as fair to limit judicial review of the decision by the basis-in-fact test. Application of the basis-in-fact test to sustain a determination of fact made *ex parte* and without opportunity for the registrant to obtain review of the determination by personal appearance and appeal would only compound the denial of due process inherent in the arbitrary and one-sided character of such a determination.

CONCLUSION.

On the basis of the errors shown herein, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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